MALAYAN BANKING BERHAD v. HONG SAN FROZEN FOODS SDN BHD

HIGH COURT MALAYA, PULAU PINANG
WONG TECK MENG JC
[ORIGINATING SUMMONS NO: 24FC-583-09-2014]
29 OCTOBER 2015

LAND LAW: *Charge – Order for sale – Lands charged to bank as security for loan – Default in repayment of loan – Opposition to application for order for sale – Whether cause to contrary shown – National Land Code, s. 256*

The plaintiff bank granted loan facilities to the defendant, a registered proprietor of two lots of land ('the said lands'). The loan was secured by three charges over the said lands. The defendant took the loan purportedly to finance its business of exporting frozen seafood to the European Union ('EU') and undertook to pay the loan with interest on demand. The loan facilities were renewed, revised and rescheduled by the plaintiff to enable the defendant to repay the monthly instalments, however, the defendant was unable to repay and had defaulted on the repayment. As such, the plaintiff issued a notice of demand dated 25 March 2014 on the defendant. The defendant did not comply with the said notice of demand and as a result, the plaintiff issued a statutory notice of default in Form 16D of the National Land Code ('NLC') against the defendant. As the defendant failed to repay the loan facilities and to remedy it within the time stipulated in Form 16D, the plaintiff applied for an order for sale of the said lands. In opposition to the plaintiff's application, the defendant raised the following issues: (i) there was a collateral agreement for the loans to be repaid only upon the release of a soft loan by the Government; (ii) the loan facilities had been frustrated due to a ban of exports of frozen seafood to the EU; (iii) there was unconscionable conduct by the plaintiff in restructuring the temporary overdraft facility into a term loan; (iv) the plaintiff had failed to give particulars of the amount claimed and the calculations and the rate of interest was disputed; (v) there was a representation by the plaintiff of its trade expertise and advisory services but the plaintiff had breached its fiduciary duty and was therefore negligent; and (vi) the defendant had a counterclaim against the plaintiff in a civil action brought by the plaintiff. The issue that arose for determination was whether the defendant was able to show the existence of 'cause to the contrary' to defeat the grant of the order for sale.

Held (granting order for sale):

(1) The allegation of the defendant was in the nature of a contractual breach which was insufficient to defeat the statutory rights of the plaintiff as the registered chargee for an order for sale. It is trite that an application under s. 256 of the NLC is an action *in rem* and not *in personam*. Furthermore, under the facility, the defendant had declared and

A confirmed that no warranties, promises, representations or collateral agreement had been made to the lender. Hence, the issue of collateral agreement was merely an allegation without any basis in fact and in law. (paras 5 & 6)

B **(2)** The issue of frustration merely constituted a defence to a contractual claim. The court ought not consider any contractual issues raised by the defendant in a charge action. The purpose for which the loans were granted was an irrelevant consideration as primarily, the plaintiff, as a bank, gave the loan facilities in consideration of the defendant's repayment in interest and nothing else. The loan facilities were granted C by the plaintiff to the defendant for the purpose of financing of exports by the defendant. It was never a term in the loan facilities that made mention of exports of seafood to the EU as the purpose for the financing. Hence, the defendant's allegation was unfounded and baseless in fact and in law. (paras 7-9)

D **(3)** The restructuring of the loan facility was at the request of the defendant and was for its benefit as the defendant was charged a lower interest rate after the restructuring. It was an indulgence given to the defendant by the plaintiff to accommodate the defendant's financial problems. Hence, the issue raised by the defendant in this respect was unsubstantiated and E baseless as the plaintiff was *bona fide* in attempting to help the defendant. (para 10)

(4) The allegations of variation of interest rate, additional interest and manifest error raised by the defendant were misconceived and irrelevant. This did not constitute cause to the contrary in an s. 256 F application. (para 11)

(5) The relationship between the plaintiff and the defendant was merely that of a banker and customer and was entirely contractual and not fiduciary in nature. Hence, contractual and tortuous allegations were irrelevant considerations under s. 256 of the NLC where the plaintiff's action here G was in exercise of its statutory remedy against the defendant. (para 13)

(6) The existence of a counterclaim by the defendant against the plaintiff in another civil action was a wholly irrelevant issue. The reason being the statutory remedy of an order for sale under s. 256 of the NLC was an H action *in rem* which was independent and distinct of any action *in personam* which the defendant may have against the plaintiff in its counterclaim. (para 14)

Case(s) referred to:

Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor [2014] 2 CLJ 773 CA I ***(refd)***

Hong Leong Bank Bhd v. Tan Siew Nam & Anor [2014] 7 CLJ 293 CA ***(refd)***

Hong Leong Bank Bhd v. WT Industries Sdn. Bhd & Ors [2005] 8 CLJ 239 HC ***(refd)***

Kandiah Peter Kandiah v. Public Bank Bhd [1993] 4 CLJ 332 SC ***(refd)***
Oriental Bank Bhd v. Cipta Permai Sdn Bhd [2003] 7 CLJ 471 HC ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

Legislation referred to:
National Land Code, s. 256(3)

For the plaintiff - Ravin Vello; M/s Vello & Ass
For the defendant - Ramsun Ho; M/s See Ramsun & Tan

Reported by Sandra Gabriel

JUDGMENT

Wong Teck Meng JC:

Introduction

[1] This is an application by the plaintiff by originating summons for an order for sale of land Lot Nos. 116 and 214 in Butterworth under s. 256 of the National Land Code 1965 (NLC). Altogether there are six affidavits affirmed by both parties in support and in opposition to the application. I have read them and also the written submissions of both parties. Basically, the defendant is the registered proprietor of the said lands which were charged to the plaintiff's bank as security for the loan facilities granted to the defendant company as borrower. Three charges were created over the said lands in favour of the plaintiff by the defendant as security for the loan facilities. In the annexures to the charges, the defendant undertook to pay on demand the loan with interest as agreed upon. It is not disputed that the loan facilities such as an overdraft, OD/OC facility, trade facilities, export credit refinancing (ECR) and hedging of foreign currencies (FEC) were granted renewed, revised and rescheduled by the plaintiff to enable the defendant to repay the monthly instalments, but the defendant was unable to repay and had defaulted on the repayment of the loan facilities.

[2] Hence, the plaintiff issued a notice of demand dated 25 March 2014 on the defendant as the borrower and chargor.

[3] The defendant did not comply with the said notice of demand and as a result, the plaintiff issued the statutory notice of default in Form 16D NLC against the defendant as the chargor of the said lands. As the defendant failed to repay the loan facilities and to remedy its breach of the provision of the charges within the time stipulated in Form 16D, this application was filed for an order for sale of the said lands.

Findings

[4] It is trite law that in an application for an order for sale in a charge action under s. 256(3) NLC, the court shall order the sale of the land in which the charges relate unless the court is satisfied that the defendant as the

chargor has raised issues to show "cause to the contrary". See *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36. In the instant case here, the only issue for determination herein is whether the defendant is able to show "cause to the contrary", under the third limb of *Low Lee Lian*'s case, namely that the granting of an order for sale would be contrary to some rule of law or equity.

[5] The first issue raised by the defendant is that there was a collateral agreement for the loans to be repaid only upon the release of the soft loan by the Government through Bank Pertanian arising from the ban of exports of frozen seafood to the European Union (EU) since 2008 ie, *moratorium*. This allegation of the defendant is in the nature of a contractual breach which is insufficient to defeat the statutory rights of the plaintiff as the registered charge for an order for sale. It is trite that an application under s. 256 NLC is an action *in rem* and not *in personam*. *Low Lee Lian*'s case (*supra*) says that:

> An allegation that the charge dated in breach of contract, while it may give rise to an independent section in personam, is insufficient *per se* to defeat the *ad rem* rights of a chargee under his registered charge to an order for sale.

[6] Furthermore, under cls. 20 to 26 of the facility agreement dated 27 October 2009 (which was entered into after the imposition of the ban of exports of frozen seafood to the EU in July, 2008), the borrower (defendant) had declared and confirmed that no warranties, promises, representations or collateral agreement have been made to the lender …". Hence, the first issue of collateral agreement is merely an allegation without any basis in fact and in law.

[7] The next issue raised by the defendant is that the loan facilities have been frustrated due to the ban of exports of frozen seafood to the EU. It is my considered view that the issue of frustration merely constitutes a defence to a contractual claim. Based on *Low Lee Lian*'s case again, this court ought not consider any contractual issues raised by the defendant in a charge action.

[8] Furthermore, the purpose for which the loans were granted is an irrelevant consideration as primarily, the plaintiff as a bank gave the loan facilities in consideration of the defendant's repayment in interest and nothing else. See *Hong Leong Bank Bhd v. Tan Siew Nam & Anor* [2014] 7 CLJ 293 which held that a banker gives a loan in consideration of its payment with interest and that the purpose for which the borrower takes the loan is not the consideration for the loan transaction.

[9] From the facts of this case, the loan facilities were granted by the plaintiff to the defendant for the purpose of financing of exports by the defendant. It was never a term in the loan facilities that made mention of exports of seafood to the EU as the purpose for the financing. Hence, this allegation is again unfounded and baseless in fact and in law.

[10] The third issue raised by the defendant is that the defendant had been subjected to 'economic duress', 'manifest disadvantage' and that there was unconscionable conduct by the plaintiff in restructuring the temporary overdraft facility into a term loan. It is my considered view from the numerous banking documents shown by the plaintiff, the restructuring of the loan facility was at the request of the defendant and was for its benefit as the defendant was charged a lower interest rate after the restructuring. It was an indulgence given to the defendant by the plaintiff to accommodate the defendant's financial problems as the defendant was unable to settle the temporary OD. Hence, the third issue raised by the defendant is unsubstantiated and baseless as the plaintiff was *bona fide* in attempting to help the defendant but unfortunately it failed.

[11] The fourth issue raised by the defendant is that the plaintiff had failed to give particulars of the amount claimed and the calculations and the rate of interest is disputed. It is my considered view that allegations of variation of interest rate, additional interest and manifest error raised by the defendant are misconceived and irrelevant. I rely on *Low Lee Lian*'s case (*supra*) again which held that on the ground that the chargee has acted in breach of contract, eg by not releasing moneys due under the loan agreement or by increasing the rate of interest without proper notice or by not giving any proper account of the sums paid by the borrower does not constitute cause to the contrary in an s. 256 NLC application.

[12] See *Oriental Bank Bhd v. Cipta Permai Sdn Bhd* [2003] 7 CLJ 471 which held that all the chargee had to show in order to obtain an order for sale in foreclosure was the fact of the inability of the chargor to settle the loan.

[13] The fifth issue raised by the defendant is that there was representation by the plaintiff of its "trade expertise" and "advisory services" and had consequently breached its fiduciary duty and other duties to the defendant and is therefore negligent. It is my considered view that the relationship between the plaintiff and the defendant is merely that of a banker and customer relationship and which is entirely contractual and not fiduciary in nature. Hence, such contractual and tortuous allegations are irrelevant considerations under s. 256 NLC where the plaintiff's action here is in exercise of its statutory remedy against the defendant. (See *Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor* [2014] 2 CLJ 773, *Hong Leong Bank Bhd v. WT Industries Sdn. Bhd & Ors* [2005] 8 CLJ 239). This issue is again baseless and misconceived.

[14] The last issue raised by the defendant is that the defendant has a counterclaim against the plaintiff in the civil action brought by the plaintiff. It is my considered view that the existence of a counterclaim by the defendant against the plaintiff in another civil action is a wholly irrelevant issue. The reason being the statutory remedy of a order for sale under s. 256 NLC is

an action *in rem* which is independent and distinct of any action *in personam* which the defendant may have against the plaintiff in its counterclaim. Reference is made to *Kandiah Peter Kandiah v. Public Bank Bhd* [1993] 4 CLJ 332 pp. 332 and 333; [1994] 1 MLJ 119 p. 122 which held:

> A charge who makes an application for an order for sale in foreclosure proceedings under s. 256 of the code does not commerce an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default ... The Court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue.

Conclusion

[15] Based on my findings above, the defendant has failed to discharge its onus of showing the existence of any cause to the contrary, and therefore I allowed the plaintiff's prayer for an order for sale in terms of the originating summons with costs of RM7,000 and for an auction date for the said lands to be fixed by the court.